

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 6

99 MAY 24 7:10:07

IN THE MATTER OF:

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CERCLA DOCKET NO. 6-02-99

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THE ODESSA DRUM SITE  
ECTOR COUNTY, TEXAS

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Proceeding under Sections 107(a) and  
122(h)(1) of the Comprehensive  
Environmental Response, Compensation  
and Liability Act, 42 U.S.C. §§ 9607(a)  
and 9622(h)(1)

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ADMINISTRATIVE ORDER  
ON CONSENT

**ADMINISTRATIVE ORDER ON CONSENT**

**I. Jurisdiction**

1. This Administrative Order on Consent ("Order" or "Consent Order") is issued under the authority vested in the Administrator of the U.S. Environmental Protection Agency ("EPA") by Section 122(h)(1) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended ("CERCLA"), 42 U.S.C. § 9622(h)(1). That authority was delegated to the Regional Administrators of the EPA by EPA Delegation No. 14-14-D (September 13, 1987), and further delegated to the Director, Superfund Division, by EPA Regional Delegations No. R6-14-14-D (August 4, 1995).

2. This Order is issued to, and agreed to by, Alpha Intermediates, Inc. ("Alpha" or "Respondent"). Respondent agrees to undertake all actions required by this Consent Order, and further consents to and will not contest EPA's jurisdiction to issue this Consent Order or to implement or enforce its terms.

3. EPA and Alpha agree that the actions undertaken by Alpha in accordance with this Consent Order do not constitute an admission of any liability. Alpha does not admit, and retains the right to controvert in any subsequent proceedings other than proceedings to implement or enforce this Consent Order, the validity of the Findings of Fact or Determinations in Sections IV and V of this Consent Order.

**II. Statement of Purpose**

4. By entering into this Consent Order, EPA and Alpha (the "Parties") intend to reach a final settlement among the parties with respect to response costs that were incurred at the Odessa Drum Superfund Site (the "Site") under Section 122(h) of CERCLA, 42 U.S.C. § 9622(h), that resolves Alpha's alleged civil liability for Past Response Costs without litigation.

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### III. Definitions

5. Unless otherwise expressly provided herein, terms used in this Consent Order that are defined in CERCLA or in regulations promulgated under CERCLA shall have the meaning assigned to them there. Whenever terms listed below are used in this Order or in the attached Appendix, the following definitions shall apply:

- a. "CERCLA" means the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, 42 U.S.C. § 9601, et seq.
- b. "Consent Order" or "Order" means this Administrative Order on Consent and any attached appendix.
- c. "Day" means a calendar day. In computing any period of time under this Order, where the last day would fall on a Saturday, Sunday, or Federal holiday, the period will run until the close of business of the next working day.
- d. "EPA" means the United States Environmental Protection Agency and any successor departments, agencies or instrumentalities of the United States.
- e. "Hazardous substance" means a hazardous substance as that term is defined in Section 101(14) of CERCLA, 42 U.S.C. § 9601(14), and further defined at 40 C.F.R. 302.4.
- f. "Interest" means interest at the current rate specified for interest on investments of the Hazardous Substance Superfund established by 26 U.S.C. § 9507, compounded annually on October 1 of each year, in accordance with 42 U.S.C. § 9607(a).<sup>1</sup>
- g. "Paragraph" means a portion of this Order identified by an Arabic numeral. Paragraphs may contain subparagraphs identified by a lower case letter.
- h. "Parties" means EPA and Respondents.
- i. "Past Response Costs" means all costs, including direct and indirect costs, that EPA or the U.S. Department of Justice on behalf of EPA has paid at or in connection with the Site through **November 2, 1998**, plus accrued interest on all such costs through that date.

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<sup>1</sup> The Superfund currently is invested in 52-week MK bills. The interest rate for these MK bills changes on October 1 of each year. To obtain the current rate, contact Vince Velez, Office of Administration and Resource Management, Financial Management Division, Superfund Accounting Branch, at (202) 260-6465.

- j. "Respondents" means those persons, corporations, or other entities listed in Appendix A.
- k. "Section" means a portion of this Consent Order identified by a Roman numeral.
- l. "Site" means the Odessa Drum Superfund Site, encompassing approximately 9.7 acres, lying just outside the city limits of Odessa, Texas, east of the corner of Alice and Judy Streets, and consisting of two tracts designated by the following property descriptions:
  - (1) Tract 6, Block 2, GREENFIELD ACRES, a Subdivision in Ector County, Texas, according to the map or plat thereof of record in Volume 3, Page 59, Plat Records of Ector County, Texas; SUBJECT TO ALL prior mineral reservations made by previous grantors, oil and gas leases, drillsite agreements, easements, pipelines, rights-of-way, water contracts and restrictions, if any, affecting said property and appearing of record in the Office of the County Clerk of Ector County, Texas. LESS - a 100' x 200' tract in the northeasterly corner of said Lot 6 adjacent to Lot 5 of Block 2, more particularly described by metes and bounds in Warranty Deed from Bob W. Yates, and wife Tillie M. Yates to Antonio Olquin and Wife Belda Elaine Olquin, recorded in Volume 543, Page 622, of the Deed Records of Ector County;
  - (2) Lot 5, Block 2, GREENFIELD ACRES, a Subdivision in Ector County, Texas, according to the map or plat thereof of record in Volume 3, Page 59, Plat Records of Ector County, Texas; SUBJECT TO ALL prior mineral reservations made by previous grantors, oil and gas leases, drillsite agreements, easements, pipelines, rights-of-way, water contracts and restrictions, if any, affecting said property and appearing of record in the Office of the County Clerk of Ector County, Texas.
- m. "United States" means the United States of America, including its departments, agencies and instrumentalities.

#### **IV. Findings of Fact**

6. The Site, which is the location of an inactive drum recycling operation, is in a mixed residential, industrial, oil and gas production, and commercial area. The Site is a "facility" as defined by Section 101(9) of CERCLA, 42 U.S.C. § 9601(9).

7. EPA conducted a site assessment at the Site on April 24-27, 1990, during which EPA representatives discovered abandoned on the Site approximately four thousand six hundred (4,600) drums, six (6) tanks, and other storage containers containing liquid, solid, and sludge waste materials, all of which contained hazardous substances.

8. Results from samples collected from the Site indicate that the following hazardous substances were in tanks, drums, and/or soil on site: chromium, lead, ammonia, naphthalene, toluene, ethylbenzene, trichloroethane, heptachlor, phenanthrene, and pyrene.

9. On August 2, 1990, the Regional Administrator of EPA Region 6 signed an Action Memorandum declaring that conditions at the Site constitute an imminent and substantial endangerment to the public health or welfare or the environment.

10. In accordance with Section 104 of CERCLA, EPA conducted a removal action at the Site beginning on August 18, 1990. The removal action consisted of the following response activities, among others:

- a. Inventorying, staging, sampling, and hazard categorizing of over four thousand six hundred (4,600) 55-gallon drums containing wastes in a liquid and solid state.
- b. Sampling of liquid waste materials in tanks at the Site.
- c. Grouping of waste materials according to compatibility.
- d. Removal of liquid waste from drums and temporary bulk storage of such wastes pending arrangements for transportation and disposal.
- e. Cleaning and restacking drums.
- f. Removal and disposal of liquid and solid waste materials to off-site disposal facilities.

11. Approximately 15,000 gallons of hazardous substances were removed from the Site and disposed of at off-site disposal facilities in the course of the removal action described above. It is estimated that over 100,000 drums remained on the Site after that action. The drums had been stacked over a large portion of the Site, some in an unstable fashion. Some of the drums at the Site had leaked, rusted, or been damaged, causing materials within the drums to be released into the soil. The abandonment of drums and tanks containing hazardous substances, and the leaking or discharge of hazardous substances into the soil at the Site, presented an imminent and substantial endangerment to human health, welfare, or the environment.

12. Because of the continued release or threatened release of hazardous substances into the environment, EPA undertook additional response action at the Site under Section 104 of CERCLA, 42 U.S.C. § 9604, in accordance with the Action Memorandum dated July 11, 1994. This second removal action consisted of the following response activities, among others:

- a. removal and disposal of approximately 100,000 drums, tanks, and other containers containing hazardous substances;

- b. removal and disposal of approximately 2600 cubic yards of contaminated soil.

13. EPA completed the second removal action on September 17, 1997. EPA is not planning further response action in connection with the Site.

14. As of November 4, 1998, total expenditures for the response action at the Site were estimated at \$7,063,989. Of this amount, a total of \$4,413,732.67 was paid from a reimbursable account funded pursuant to EPA settlements with de minimis and major parties. EPA has recovered an additional \$2,114,240.69 directly from settling parties. Taking these figures into account leaves unrecovered approximately \$536,015.64 that EPA incurred as response costs at or in connection with the Site.

15. Respondent arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of a hazardous substance owned or possessed by such Respondent, by any other person or entity, at the Site. Respondent is therefore a responsible party under Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), and is jointly and severally liable for response costs incurred in connection with the Site.

16. Respondent's signature hereto will not be deemed to be an agreement as to EPA's allocation method or apportionment of liability at the Site. Respondent believes that the payments required of it are greater than its fair share of the total response costs.

#### **V. Parties Bound**

17. This Consent Order is binding upon EPA and upon Alpha and its directors, officers, employees, agents, successors, and assigns. Any change in ownership or corporate or other legal status of Alpha, including any transfer of assets or real or personal property, will in no way alter Alpha's responsibilities under this Consent Order. Each signatory to this Consent Order certifies that he or she is authorized to enter into the terms and conditions of this Consent Order and to bind legally the party represented by him or her.

#### **VI. Determinations**

18. Based upon the Findings of Fact set forth above and on the administrative record for this Site, EPA has determined that:

- a. The Site is a "facility" as that term is defined in Section 101(9) of CERCLA, 42 U.S.C. § 9601(9).
- b. Alpha is a "person" as that term is defined in Section 101(21) of CERCLA, 42 U.S.C. § 9601(21).
- c. Alpha is a potentially responsible party within the meaning of Sections 107(a) and 122(h)(1) of CERCLA, 42 U.S.C. §§ 9607(a) and 9622(h)(1).

- d. The substances listed Paragraph 8 are “hazardous substances” as that term is defined in Section 101(14) of CERCLA, 42 U.S.C. § 9601(14) and further defined at 40 C.F.R. § 302.4.
- e. The past, present, or future migration of hazardous substances from the Site constitutes an actual or threatened “release” as that term is defined in Section 101(22) of CERCLA, 42 U.S.C. § 9601(22).
- f. Prompt settlement with Respondents is fair, reasonable and practicable and in the public interest within the meaning of Section 122(h)(1) of CERCLA, 42 U.S.C. § 9622(h)(1).

## **VII. Order**

19. Based on the administrative record and the Action Memoranda for this Site and the Findings of Fact and Determinations set forth above, and in consideration of the promises and covenants set forth herein, the following is hereby AGREED TO AND ORDERED:

## **VIII. Payment**

20. Respondent shall pay to the EPA Hazardous Substance Superfund the sum of \$155,259.15 (the “Payment Amount”) in reimbursement of Past Response Costs, plus an additional sum for Interest on that amount calculated from the date set forth in the definition of Past Response Costs through the date of payment. The Payment Amount is payable in three annual installments of \$51,753.05 plus appropriate Interest. The first of these payments must be paid no later than thirty (30) days after the effective date of this Consent Order. The second and third payments will be due one and two years, respectively, after the due date of the first payment.

21. Respondent shall make its payment by certified or cashier’s check made payable to “EPA Hazardous Substance Superfund.” Each check shall reference the name and address of the party making payment, the “Odessa Drum Site” the EPA Region and Site/Spill ID Number 0622, and the words “EPA Docket Number 6-02-99,” and shall be sent by overnight express mail to:

EPA Superfund - Odessa Drum Site (AS)  
CERCLIS # TXD008012254  
Superfund Accounting  
P.O. Box 360582M  
Pittsburgh, Pennsylvania 15251  
ATTN: COLLECTION OFFICER FOR SUPERFUND

22. Each Respondent shall simultaneously send a copy of its check to:

Chief, Superfund Cost Recovery Section (6SF-AC)  
U.S. Environmental Protection Agency, Region 6  
1445 Ross Avenue  
Dallas, Texas 75202-2733

## **IX. Failure to Make Payment**

23. If any payment required by Paragraph 21 or 22 is not made when due, Interest shall continue to accrue on the unpaid balance through the date of payment.

24. If Respondent fails to pay any amount due to EPA under Paragraph 21 or 22 by the required date, Respondent shall pay to EPA the following stipulated penalty for each day that any of its scheduled payments is late:

<u>Amount Per Day</u>	<u>Number of Days Late</u>
\$150.00 plus 1% of scheduled installment	1 through 7 days
\$150.00 plus 2% of scheduled installment	8 days and beyond

EPA shall deem payment to be late if the postmark date of a payment is later than the due date. The penalty payment and a copy of the check shall be sent to the respective addresses designated in paragraphs 21 and 22.

25. Stipulated penalties are due and payable within 30 days of the date of demand for payment of the penalties. All payments to EPA under this Section shall be identified as "stipulated penalties" and shall be sent to the respective addresses designated in Paragraphs 21 and 22.

26. Penalties will accrue as provided above regardless of whether EPA has notified Alpha of the violation or made a demand for payment, but need only be paid upon demand. All penalties shall begin to accrue on the day after performance is due, or the day a violation occurs, and shall continue to accrue through the final day of correction of the noncompliance or completion of the activity. Nothing herein prevents the simultaneous accrual of separate penalties for separate violations of this Order.

- a. In addition to the Interest and Stipulated Penalty payments required by this Section and any other remedies or sanctions available to EPA by virtue of Alpha's failure to comply with the requirements of this Order, any Settling Party who fails or refuses to comply with any term or condition of this Order shall be subject to enforcement action under Section 122(h)(3) of CERCLA, 42 U.S.C. § 9622(h)(3). If the United States, on behalf of EPA, brings an action to enforce this Order, Alpha shall reimburse the United States for all costs of such action, including costs of attorney time.
- b. The obligations of Respondents to pay amounts owed to EPA under this Order are joint and several. In the event of the failure of any one or more Respondents to make the payments required under this Order, the remaining Respondents shall be responsible for such payments.

- c. Notwithstanding any other provision of this Section, EPA may, in its unreviewable discretion, waive payment of any portion of the stipulated penalties that have accrued under this Consent Order.

#### **X. Covenant Not to Sue by EPA**

27. Except as specifically provided in Section XI (Reservations of Rights by EPA), EPA covenants not to sue Alpha under Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), to recover Past Response Costs. This covenant shall take effect upon receipt by EPA of all amounts required by Section VIII (Payment) and Section IX (Failure to Make Payment). This covenant not to sue is conditioned upon Alpha's satisfactory performance of its obligations under this Consent Order. This covenant not to sue extends only to Alpha and does not extend to any other person.

#### **XI. Reservation of Rights by EPA**

28. The covenant not to sue by EPA set forth in Paragraph 27 does not pertain to any matters other than those expressly identified therein. EPA reserves, and this Consent Order is without prejudice to, all rights against Alpha with respect to all other matters, including:

- a. liability for failure of Alpha to meet a requirement of this Consent Order;
- b. liability for costs incurred or to be incurred by the United States that are not within the definition of Past Response Costs;
- c. liability for injunctive relief or administrative order enforcement under Section 106 of CERCLA, 42 U.S.C. § 9606;
- d. criminal liability; and
- e. liability for damages for injury to, destruction of, or loss of natural resources, and for the costs of any natural resource damage assessments.

29. Nothing in this Consent Order is intended to be nor shall it be construed as a release, covenant not to sue, or compromise of any claim or cause of action, administrative or judicial, civil or criminal, past or future, in law or in equity, which the United States may have against any person, firm, corporation or other entity not a signatory to this Consent Order.

#### **XII. Covenant Not to Sue by Respondent**

30. Alpha agrees not to assert any claims or causes of action against the United States, or its contractors or employees, with respect to Past Response Costs or this Consent Order, including:

- a. any direct or indirect claim for reimbursement from the EPA Hazardous Substance Superfund based on Sections 106(b)(2), 107, 111, 112, or 113

of CERCLA, 42 U.S.C. §§ 9606(b)(2), 9607, 9611, 9612, or 9613, or any other provision of law;

- b. any claims arising out of the response actions at the Site for which the Past Response Costs were incurred; and
- c. any claim against the United States under Sections 107 and 113 of CERCLA, 42 U.S.C. §§ 9607 and 9613, relating to Past Response Costs.

31. Nothing in this Consent Order shall be deemed to constitute approval or preauthorization of a claim within the meaning of Section 111 of CERCLA, 42 U.S.C. § 9611, or 40 C.F.R. 300.700(d).

### **XIII. Effect of Settlement/Contribution Protection**

32. Nothing in this Consent Order shall be construed to create any rights in, or grant any cause of action to, any person not a Party to it. EPA and Respondent each reserve all rights (including any right to contribution), defenses, claims, demands, and causes of action that each of the Parties may have concerning any matter, transaction, or occurrence relating to the Site against any person not a Party hereto.

33. The Parties agree that Alpha is entitled, as of the effective date of this Consent Order, to protection from contribution actions or claims as provided by Sections 113(f)(2) and 122(h)(4) of CERCLA, 42 U.S.C. §§ 9613(f)(2) and 9622(h)(4), for "matters addressed" in this Consent Order. The "matters addressed" in this Consent Order are Past Response Costs.

34. Respondent agrees that with respect to any suit or claim for contribution brought by it for matters related to this Consent Order, it will notify EPA in writing no later than 60 days before initiating such suit or claim. Respondent also agrees that, with respect to any suit or claim for contribution brought against it for matters related to this Consent Order, it will notify EPA in writing within 10 days of service of the complaint or claim upon it. In addition, Respondent shall notify EPA within 10 days of service or receipt of any Motion for Summary Judgment and within 10 days of receipt of any order from a court setting a case for trial, for matters related to this Consent Order.

35. In any subsequent administrative or judicial proceeding initiated by EPA, or by the United States on behalf of EPA, for injunctive relief, recovery of response costs, or other appropriate relief relating to the Site, Respondent shall not assert or maintain any defense or claim based upon the principles of waiver, res judicata, collateral estoppel, issue preclusion, claim-splitting, or other defenses based upon any contention that the claims raised in the subsequent proceeding were or should have been brought in the instant case; provided, however, that nothing in this Paragraph affects the enforceability of the covenant not to sue by EPA set forth in Paragraph 27.

#### **XIV. Retention of Records**

36. Until 10 years after the effective date of this Consent Order, Respondent shall preserve and retain all records and documents now in its possession or control, or which come into its possession or control, that relate to response actions taken at the Site or to the liability of any person for response actions conducted and to be conducted at the Site, regardless of any corporate retention policy to the contrary.

37. After the conclusion of the document retention period in the preceding paragraph, Respondent shall notify EPA at least 90 days before the destruction of any such records or documents, and, upon request by EPA, Respondent shall deliver any such records or documents to EPA. Respondents may assert that certain documents, records, or other information are privileged under the attorney-client privilege or any other privilege recognized by federal law. If Respondent asserts such a privilege, it shall provide EPA with the following: 1) the title of the document, record, or information; 2) the date of the document, record, or information; 3) the name and title of the author of the document, record, or information; 4) the name and title of each addressee and recipient; 5) a description of the subject of the document, record, or information; and 6) the privilege asserted. However, no documents, reports, or other information created or generated in accordance with the requirements of this or any other judicial or administrative settlement with the United States shall be withheld on the grounds that they are privileged. If a claim of privilege applies only to a portion of a document, the document shall be provided to EPA in redacted form to mask the privileged information only. Respondent shall retain all records and documents that they claim to be privileged until EPA has had a reasonable opportunity to dispute the privilege claim and any such dispute has been resolved in Respondent's favor.

38. By signing this Consent Order, Respondent certifies that, to the best of its knowledge and belief, it has:

- a. conducted a thorough, comprehensive, good faith search for documents, and has fully and accurately disclosed to EPA all information currently in its possession, or in the possession of its officers, directors, employees, contractors or agents, which relates in any way to the ownership, operation or control of the Site, or to the ownership, possession, generation, treatment, transportation, storage or disposal of a hazardous substance, pollutant or contaminant in connection with the Site;
- b. not altered, mutilated, discarded, destroyed or otherwise disposed of any records, documents or other information relating to its potential liability regarding the Site, after notification of potential liability or the filing of a suit against Respondent regarding the Site; and
- c. fully complied with all EPA requests for information regarding the Site under Sections 104(e) and 122(e) of CERCLA, 42 U.S.C. §§ 9604(e) and 9622(e).

#### **XIV. Notices and Submissions**

39. Whenever, under the terms of this Consent Order, notice is required to be given or a document is required to be sent by one Party to another, it shall be directed to the persons at the addresses specified below, unless those persons or their successors give notice of a change to the other Parties in writing. Written notice as specified herein shall constitute complete satisfaction of any written notice requirement of this Consent Order with respect to EPA and Respondent.

As to EPA:

Michael Boydston (6SF-DL)  
Staff Attorney  
EPA Region 6  
1445 Ross Avenue  
Dallas TX 75202

As to Respondent:

Larry and Lynette Gatlin  
4420 South Flores Road  
Elmendorph TX 78112

*with a copy to:*

Jo-Christy Brown, Esq.  
Brown Carls & Mitchell, LLP  
515 Congress Avenue, Suite 2150  
Austin, Texas 78701

#### **XVI. Integration/Appendix**

40. This Consent Order and its appendices constitute the final, complete and exclusive agreement and understanding among the Parties with respect to the settlement embodied in this Consent Order. The Parties acknowledge that there are no representations, agreements or understandings relating to the settlement other than those expressly contained in this Consent Order. Attached to and incorporated into this Consent Order is "Appendix A," which is to contain the written approval of the Attorney General of the United States.

#### **XVII. Public Comment**

41. This Consent Order shall be subject to a thirty day public comment period in accordance with Section 122(i) of CERCLA, 42 U.S.C. § 9622(i). In accordance with Section 122(i)(3) of CERCLA, 42 U.S.C. § 9622(i)(3), EPA may withdraw or withhold its consent to this Consent Order if comments received disclose facts or considerations indicating that this Consent Order is inappropriate, improper or inadequate.

#### **XVI. Attorney General Approval**

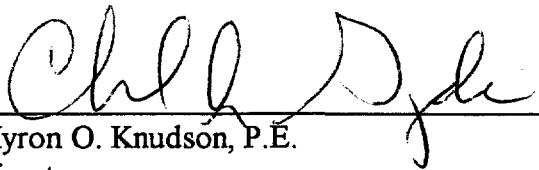

42. The Attorney General of the United States or her designee must approve the settlement embodied in this Consent Order in accordance with Section 122(g)(4) of CERCLA, 42 U.S.C. § 9622(g)(4).

#### **XVII. Effective Date**

43. The effective date of this Consent Order shall be the date on which EPA issues written notice to the Respondents that the public comment period under Paragraph 41 of this AOC has closed and that any comments received do not require modification of or EPA withdrawal from this AOC, and that this AOC has been approved by the Attorney General.

**IT IS SO AGREED AND ORDERED:**

**FOR THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY:**

By:  Date: 5/21/99  
 Myron O. Knudson, P.E.  
Director  
Superfund Division

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 6

IN THE MATTER OF:

THE ODESSA DRUM SITE  
ECTOR COUNTY, TEXAS

Proceeding under Sections 107(a) and  
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§ CERCLA DOCKET NO. 6-02-99  
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§ ADMINISTRATIVE ORDER  
§ ON CONSENT

AGREED:

By:

Lynette M. Gatlin  
Signature

Date: December 14, 1998

Lynette M. Gatlin  
Print name

President  
Title (Print)

Alpha Intermediates, Inc.  
Company Name

4420 S. Flores Rd. Elmendorf, TX 78112  
Company Address